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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 332

LEROY J. LEISHMAN, PETITIONER,

vs

**ASSOCIATED WHOLESALE ELECTRIC COMPANY,
A CORPORATION**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT**

PETITION FOR CERTIORARI FILED AUGUST 24, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

No. 9970

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LeROY J. LEISHMAN;

Appellant,

vs.

**ASSOCIATED WHOLESALE ELECTRIC
COMPANY, a Corporation,**

Appellee.

VOLUME IV

Pages 683 to 691

**Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division**

**PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, April 21,
1942.

Before: Mathews, Haney and Stephens,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. John Flam,
counsel for appellant, and by Mr. Leonard S. Lyon,
counsel for appellee, and submitted to the court for
consideration and decision; with leave to counsel
for respective parties to file further briefs 5 x 3.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, May 26,
1942.

Before: Mathews, Haney and Stephens,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION
AND FILING AND RECORDING OF
DECREE

By direction of the Court, Ordered that the type-
written opinion this day rendered by this court in

above ~~case~~ be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

In the United States Circuit Court of Appeals
for the Ninth Circuit

Appeal from the District Court of the United
States for the Southern District of California,
Central Division.

OPINION

Before: Mathews, Haney and Stephens,
Circuit Judges.

Mathews, Circuit Judge.

Appellant brought an action against appellee for infringement of a patent. Appellee answered, trial was had, findings of fact and conclusions of law were made and filed, and judgment was entered dismissing the action. From that judgment this appeal is prosecuted.

The question is whether we have jurisdiction of the appeal. Though not raised by the parties, the question is here and has to be decided. *City and County of San Francisco v. McLaughlin*, 9 Cir., 9 F. 2d 390; *Credit Bureau of San Diego v. Petrasich*, 9 Cir., 97 F. 2d 65, 67; *Crockett v. United States*, 9 Cir., 125 F. 2d 547, 549.

Section 8(c) of the Act of February 13, 1925, c. 229, 43 Stat. 940, 28 U.S.C.A. § 230, provides: "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree." With respect to appeals from judgments in civil actions, rule 73(a) of the Federal Rules of Civil Procedure provides: "When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal." The time referred to in rule 73(a) is that prescribed in § 8(c), namely, three months after entry of judgment.

The judgment in this case was entered on May 1, 1941. Notice of appeal was filed on September 4, 1941—four months and three days after entry of judgment. We called this to counsel's attention and permitted briefs to be filed on the question of the timeliness of the appeal.

Appellant, in his brief, invokes the rule that, where a petition for a rehearing,¹ a motion for a

¹ *Idaho Irrigation District v. Gooding*, 9 Cir., 285 F. 453, 461; *Thomas Day Co. v. Doble Laboratories*, 9 Cir., 41 F. 2d 51 (cited by appellant); *The Astorian*, 9 Cir., 57 F. 2d 85 (cited by appellant); *Mitchell v. Maurer*, 9 Cir., 67 F. 2d 286.

new trial² or a motion to vacate,³ amend⁴ or modify⁵ a judgment is seasonably made and is entertained, the time for appeal does not begin to run until the motion is disposed of.⁶ This rule, however, avails appellant nothing; for, in this case, there was no petition for a rehearing, no motion for a new trial, no motion to vacate, amend or modify the judgment.

On May 28, 1941—27 days after entry of judgment—appellant moved the court to amend and supplement its findings and conclusions. The motion was denied on June 9, 1941. Appellant would have us treat the motion as a petition for a rehearing, a motion for a new trial or a motion to vacate, amend or modify the judgment, and so would have us hold that the time for appeal did not begin to run until the motion was denied. This we cannot do; for the motion was not, and did not purport to be, a petition for a rehearing, a motion for a new trial or a motion to vacate, amend or modify the judgment.

The motion was made under rule 52(b) of the Federal Rules of Civil Procedure, which provides: "Upon motion of a party made not later than 10 days after entry of judgment the court may amend

²*Montgomery Ward & Co. v. Banque Belge*, 9 Cir., 298 F. 446; *Davis v. Livingston*, 9 Cir., 13 F. 2d 605; *Janus v. United States*, 9 Cir., 38 F. 2d 431.

³*Southern Pacific Co. v. Sartoris*, 9 Cir., 27 F. 2d 852; *Neely v. Merchants Trust Co.*, 3 Cir., 110 F. 2d 525 (cited by appellant).

⁴*Fiske v. Wallace*, 8 Cir., 115 F. 2d 1003 (cited by appellant).

⁵*United States v. Steinberg*, 2 Cir., 100 F. 2d 124.

⁶See cases cited in footnotes 1-5.

its findings or make additional findings and may amend the judgment accordingly." The motion in this case, though not made within the time prescribed in rule 52(b), was made within that time as enlarged by an order obtained by appellant pursuant to rule 6(b) of the Federal Rules of Civil Procedure.⁷ The order, however, did not extend the time for taking an appeal and could not have done so; for rule 6(b) expressly forbids any such extension.

Rule 52(b) provides, as shown above, that the court may, upon motion of a party, amend its judgment as well as its findings. The motion in this case was not, however, a motion to amend the judgment. It was merely a motion to amend and supplement the findings and conclusions. Appellant cites no case, and we have found none, holding that such a motion extends the time for taking an appeal.

The cases cited in appellant's brief (Thomas Day Co. v. Doble Laboratories, 9 Cir., 41 F. 2d 51; The Astorian, 9 Cir., 57 F. 2d 85; Neely v. Merchants Trust Co., 3 Cir., 110 F. 2d 525; Fiske v. Wallace, 8 Cir., 115 F. 2d 1003) are readily distinguishable from the case at bar. There was, in the Thomas Day

⁷ Rule 6(b) provides: "When by these rules * * * an act is required or allowed to be done within a specified time, the court for cause shown may, at any time in its discretion * * * order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order * * *; but it may not enlarge * * * the period for taking an appeal as provided by law."

case, a petition for rehearing; in *The Astorian*, a similar petition; in the *Neely* case, a motion to vacate the judgment; in the *Fiske* case, a motion to amend the judgment. In the case at bar, there was no petition for a rehearing, no motion to vacate or amend the judgment.

We conclude that the time within which appellant could have taken a valid appeal expired on August 1, 1941 (three months after entry of judgment); that the appeal actually taken—on September 4, 1941—was not a valid appeal; and that we have no jurisdiction thereof. *Von Holt v. Carter*, 9 Cir., 56 F. 2d 61, 63.

Appeal dismissed.

[Endorsed]: Opinion. Filed May 26, 1942. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9970.

LeROY J. LEISHMAN,

Appellant,

vs.

ASSOCIATED WHOLESALE ELECTRIC CO.,
Appellee.

DECREE

Appeal from the District Court of the United States for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the appeal in this cause be, and hereby is, dismissed with costs in favor of the appellee and against the appellant.

It Is Further Ordered, Adjudged, and Decreed by this Court, that the appellee recover against the appellant for its costs herein expended; and have execution therefor.

[Endorsed]: Filed and entered May 26, 1942. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Saturday, July 25, 1942.

Before: Mathews, Haney and Stephens,
Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR REHEAR-
ING, AND STAYING ISSUANCE OF
MANDATE

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant, filed June 23, 1942, and within time allowed

therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

Upon consideration of the application of Mr. John Flam, counsel for appellant, It Is Further Ordered that the issuance of the mandate of this Court in above cause be, and hereby is stayed to and including August 29, 1942, and if the petition for writ of certiorari to be hereafter made by the appellant herein be docketed in the clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this court is to be stayed until after the said Supreme Court disposes of the petition.

[Title of Circuit Court of Appeals and Cause.]

**CERTIFICATE OF CLERK, U. S. CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, TO RECORD CERTIFIED UN-
DER RULE 38 OF THE REVISED RULES
OF THE SUPREME COURT OF THE
UNITED STATES.**

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing six hundred ninety (690) pages, numbered from and including 1 to and including 690, to be a full, true and correct copy of the entire record excluding certain original exhibits of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 10th day of August, 1942.

[Seal]

PAUL P. O'BRIEN,

Clerk.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 332

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The Petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4290)